



Signed: July 07, 2006

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 05-44325 TM
Chapter 7

ABDULLAH QARI and RAHELA
JALAL QARI,

Debtors.

MEMORANDUM OF DECISION RE MOTIONS TO AVOID JUDICIAL LIENS

The above-captioned debtors (the "Debtors") filed motions to avoid the judicial liens of Patelco Credit Union ("Patelco") on their residence (the "Residence") on the ground that the liens impaired their homestead exemption. See 11 U.S.C. § 522(f)(1)(A). Patelco opposed the motion and asked the Court, if it granted the motion, to stay the effectiveness of the order until its nondischargeability proceeding was completed. The Debtors opposed this request on the ground that there was no legal basis for doing so and to do so would

1 interfere with their pending sale of the Residence.¹ The Court took
2 the motions under submission.

3 Having reviewed the filings in the case and the applicable law,
4 the Court agrees with the Debtors that there is no legal basis for
5 delaying the effectiveness of an order granting a motion to avoid a
6 judgment lien under 11 U.S.C. § 522(f) on the ground that the claim
7 underlying the judgment is or may be determined to be
8 nondischargeable. The Court will grant the motion as to the more
9 junior of the two judgment liens. However, the Court is unable to
10 grant the motion as to the more senior of the two judgment liens at
11 this time due to the Court's uncertainty as to the amounts of the
12 other liens on the Residence.

13 The Debtors contended that Patelco's judgment liens should be
14 avoided in their entirety. According to the Court's calculations,
15 using the numbers set forth in the Debtors' motions, \$18,000 of the
16 senior Patelco judgment lien was not avoidable. The difference
17 appears to relate to a scheduled judgment lien in favor of Safe
18 Credit Union ("Safe") which is not mentioned in the Debtors' motions
19 (although it is mentioned in Patelco's opposition to the motions).
20 The Court is uncertain whether the Safe judgment lien is still or
21 ever was a valid lien on the Residence.

22
23
24
25 ¹The Debtors scheduled the value of the Residence at \$570,000
26 and, in support of their motions, provided an appraisal as of the
petition date supporting this valuation. At the hearing on the
motions, they informed the Court that they have entered into an
agreement to sell the Residence for \$725,000.

1 The Court notes that, in the fall of 2005, the Debtors filed an
2 adversary proceeding against Safe contending that the Safe judgment
3 lien did not attach to the Residence because the judgment was only
4 against Mr. Qari whereas the Residence is held in the sole name of
5 Mrs. Qari. This proceeding was apparently settled and the adversary
6 proceeding dismissed. Even if the Safe lien is a valid judgment lien
7 against the property, depending on the terms of the settlement, the
8 Debtors may be judicially estopped from relying on the Safe judgment
9 lien to avoid the senior Patelco judgment lien in its entirety.²

10 In addition, the Court notes that the Debtors are under the
11 misapprehension that they are empowered to sell the Residence at this
12 time. They are not. The Residence is still property of the estate
13 which only the chapter 7 trustee (the "Trustee") can sell. See 11
14 U.S.C. § 363(b)(1).³ Any value of the Residence in excess of the
15

16 ²At the hearing, Patelco explained that, in its view, the Safe
17 judgment lien, which it contended was recorded after its judgment
18 liens, could not be included in the calculation. The Debtors
19 argued that, in any event, the Safe judgment lien was recorded
20 before the Patelco judgment liens. However, neither party could
21 supply the Court with support for their position as to when the
22 Safe judgment lien was recorded. Having reviewed the underlying
23 filings, the Court notes that, according to the Debtors' filings,
the Safe judgment lien was recorded after the Patelco judgment
liens. However, Patelco's contention that, in calculating whether
a judgment lien impairs a homestead exemption, junior liens are not
counted is clearly in error. See 11 U.S.C. § 522(f)(2)(A). The
case cited by Patelco in support of its contention, In re Silveira,
141 F.3d 34 (1st Cir. 1998), is inapposite.

24 ³In their motions, the Debtors state that the Trustee has
25 "effectively" abandoned the Residence. By this, they apparently
26 mean that he should be treated as having abandoned it. The Trustee
has not affirmatively abandoned the Residence by noticing his
intention to do so to creditors, and the case has not been closed.
Therefore, the Residence is still property of the estate. See 11

1 liens against the Residence, the Debtors' exemption, and the costs of
2 sale belong to the bankruptcy estate. See In re Hyman, 967 F.2d
3 1316, 1321 (9th Cir. 1992); In re Reed, 940 F.2d 1317, 1321, n.3 (9th
4 Cir. 1991). The Trustee is advised to investigate whether he wishes
5 to adopt the Debtors' proposed sale of the Residence for the benefit
6 of the estate.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
END OF DOCUMENT

U.S.C. § 554(a),(c),(d).

COURT SERVICE LIST

Edward O. Lee
152 Anza St., Ste. 101
Fremont, CA 94539

Spencer P. Scheer
Scheer & Imfeld, LLP
100 Smith Ranch Rd., Ste. 306
San Rafael, CA 94903

Paul Mansdorf
4071 San Pablo Dam Rd., #433
El Sobrante, CA 94803